U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 23Jul2002

BALCA Case No. 2001-INA-148
ETA Case No. P1998-CA-09436731/JS

In the Matter of:

CITY TOURS & TRAVELS,
Employer

on behalf of:

ABRAHAM YOSORES LLANTO,
Alien

Appearance: Theodore A. Behlendort, Esquire
Los Angeles, CA

Certifying Officer: Martin Rios
San Francisco, CA

Before: Holmes, Vittone, and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Abraham Yosores Llanto ("Alien") filed by City Tours & Travel ("Employer") pursuant to §212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Office ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer requested review pursuant to 20 C.F.R. §656.26.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and Attorney General that: 1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and 2) the employment of the alien will not adversely affect the wages and working conditions of United

States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On January 12, 1998, the Employer, City Tours & Travels, filed an application for labor certification to enable the Alien, Abraham Yosores Llanto, to fill the job titled "Lead Ticket-Sales Agent, Bilingual," which the Job Service re-classified as "Travel Agent" (AF 56). The job duties for the position, as stated on the application, are as follows:

> Will supervise and coordinate activities in selling of airline tickets to customers, mostly Filipinos. Will train and instruct workers in the operation of the Sabre computer terminals and printers and coordinate with various airlines regarding availability of flights and suggest travel itineraries for customers. Prepare reports on sales and cash received.

(AF 56).

The stated job requirements for the position, as set forth on the application, are as follows: 2 years of experience in the job offered or in the related occupation of "Customer Service Agent, Travel;" and, "[m]ust speak Tagalog/English" (AF 56).

In the Notice of Findings ("NOF") issued on March 27, 2001, the CO proposed to deny certification on the following bases: 1) The ETA 750B form was incomplete, because it failed to set forth the Alien's employment history for the more than two year period immediately preceding the submission of the application; 2) The two year experience requirement is unduly restrictive for the (Job Service) classification of the position as Travel Agent; and, 3) Employer failed to establish that there is an existing job opening truly available to U.S. workers, or even establish that it meets the regulatory definition of "Employer" set forth in 20 C.F.R. §656.3 (AF 50-54). On or about April 25, 2001, the Employer submitted its rebuttal to the NOF (AF 36-49). The CO found the rebuttal unpersuasive regarding the latter two grounds and issued a Final Determination, dated May 2, 2001, denying certification on those bases (AF 6-7). On or about May 15, 2001, the Employer filed a "Motion for Reconsideration/Request for Review," which consisted of the Employer's argument and various exhibits (AF 4-32). On June 22, 2001, the CO

denied the Motion for Reconsideration on the grounds that issues raised therein could have been addressed on rebuttal (AF 3). On July 16, 2001, the Employer renewed its request for review (AF 1). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals. On October 8, 2001, the Employer filed a Statement of Position/Brief, which has been considered.

Discussion

In the present case, there are essentially two issues: 1) whether the two-year experience requirement is unduly restrictive; and, 2) whether there is a bona fide job opportunity that is truly open to U.S. workers.

Restrictive Requirement:

In the NOF, the CO relied upon the Job Service's re-classified job title of "Travel Agent," which is described in D.O.T. 252.152-010, and lists a Specific Vocational Preparation ("SVP") level of 5. The SVP rating of 5 corresponds with a period of "Over 6 months up to and including 1 year" of combined education, training, and experience. Therefore, assuming the Job Service correctly re-classified the position as "Travel Agent," the two-year experience would be unduly restrictive. *See,* 20 C.F.R. §656.21(b)(2)(i)(B). Based upon that re-classification, the CO directed the Employer to either delete the restrictive requirement or justify the requirement as based on business necessity (AF 51-52).

On rebuttal, the Employer neither deleted the requirement nor presented evidence of business necessity, as requested by the CO. However, the Employer challenged the Job Service's re-classification, and reiterated that the job in question is actually a "Lead Ticket-Sales Agent," as Employer had listed on the ETA 750A form. As stated by the Employer, the "Lead Ticket-Sales Agent" position is described in the Dictionary of Occupational Titles ("D.O.T.") under D.O.T. 238.137-022, and lists a Specific Vocational Preparation ("SVP") of 6. The SVP rating of 6 corresponds with a period of "Over 1 year up to and including 2 years" of combined education, training, and experience. Thus, if the Employer correctly classified the position as "Lead Ticket-Sales Agent," the two-year experience requirement would not be unduly restrictive, because it falls within the SVP rating of 6 (AF 37).

In the Final Determination, the CO stated, in pertinent part:

> ...[W]e find that the job was correctly classified as a travel agent. The employer has referred to a position under the 238 series of the Dictionary of Occupational Titles, which includes ticket agents and gate agents who service patrons of a transportation agency. The employer's suggested occupation, Supervisor, Ticket Sales, has the following context: "Supervises and coordinates activities of personnel engaged in selling tickets for scheduled airline flights in airline ticket office or terminal." However, as explained in the initial introduction to section 238

> of the Dictionary of Occupational Titles, "Travel agents engaged in selling and arranging travel and lodging services on a commission basis are found in group 252."
>
> The employer has indicated throughout the case record that the company is a travel agency and that it employs independent contractors as agents. We find that the job was properly classified as a travel agent. A title chosen by an employer in box 9 of the application Form ETA 750 A will not be the basis for determining the occupation shown by the job duties, and the context. The employer had the opportunity to present business necessity justification based on any particular practical issues. The counter suggestion of a different occupational classification is not persuasive in this case. However, the employer did not delete the excess experience required. Therefore we find that the employer remains in violation of 20 CAR (sic) 656.21(b)(2).

(AF 34).

In its "Motion for Reconsideration/Request for Review," the Employer argued and submitted documentation, in pertinent part, which represented that the Employer is not only a travel agency, but also "an airline ticket consolidator." Accordingly, the Employer reiterated that the CO had mis-classified the position as travel agent, instead of Lead Ticket-Sales Agent (AF 4-32). The CO, however, did not even consider such evidence, stating that it could have been addressed in the rebuttal (AF 3).

Upon review, we find that the CO should have considered the merits of the Motion for Reconsideration, particularly regarding this issue. We note that the CO determined that the position should be classified as a "Travel Agent" citing the introductory language to Sections 238 and 252, respectively, and evidence that the company is a travel agency which employs independent contractors as agents. However, this is the first time that the CO cited the foregoing as the basis for the job classification finding of "Travel Agent." Furthermore, we are somewhat puzzled by the CO's reliance on the introductory language to Section 238 of the D.O.T. As stated by the CO, it provides that "Travel agents engaged in selling and arranging travel and lodging services on a commission basis are found in group 252." Yet, the position offered is a *salaried* position. Moreover, we find that the job duties for the position, as set forth in the ETA 750A form, Item 13, are more consistent with the position of "Supervisor, Ticket Sales" and its alternate title of "lead-ticket sales agent" (D.O.T. 238.137-022), than the position of "Travel Agent" (D.O.T. 252.152-010). Accordingly, on its face, it appears that the Employer's job classification was correct, and that the two-year requirement is not unduly restrictive. This presupposes that the job duties described by the Employer are accurate. However, the CO also denied certification on the grounds that the Employer had failed to establish that a bona fide job opportunity truly exists. Accordingly, we must also address the latter issue herein.

Questionable Job Opportunity:

In the NOF, the CO stated, in pertinent part:

There is question whether a current job opening exists to which U.S. workers can be referred. In seeking labor certification, the employer must offer a job that is truly open to U.S. workers. 20 CFR 656.20(c)(8).

According to 20 CFR 656.3, the term "Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment and which proposes to employ a full-time worker at a place within the United States.

In this instance, the petitioning employer is a travel agency petitioning for a lead sales agent. However, the employer indicates that its agents include independent contractors. It is not clear how the employer has determined that the labor certification position is for an employee whereas other agents are not considered employees.

There is a question as to whether the beneficiary is an owner or is related to an owner, whether the position is truly a position for an employee, and thus whether the job is truly open to any qualified worker.

Corrective action:

Show if the firm is a corporation, partnership or sole proprietorship. Provide documentation including the articles of incorporation if incorporated, or partnership information.

Provide the names and titles of all partners. If incorporated, submit articles of incorporation, listing the names and titles of all corporate officers, and the alien's relation to same. If the corporation is owned by another corporation show whether the alien has any ownership interest in that corporation, the extent of that ownership, and whether the alien is related to any owners of the parent corporation.

Show the relationship between the alien and all owners, officers and partners.

Show alien's ownership interest, including percentage of stock owned and the value of the alien's ownership in the firm compared to the total value of the firm. Show any relationship the alien has with other owners of the firm. Show the alien's authority to hire/fire employees and the scope of this authority.

If the alien owns part or all of the firm, or is related to any owner, show how the job offer is clearly open to a U.S. worker. In addition, show how the person who

> makes the hiring decision for the position in question is completely independent of the alien and the alien's influence.
>
> However, relationship or ownership are not the only factors that may be reviewed when the question of whether the job is truly open to U.S. workers (sic). In this instance, there is some question as to whether the (sic) job has been done by an employee or whether the employee position is being created for the labor certification application. Therefore the employer is directed to show how it was determined that the job being petitioned for here qualified to be considered as a position for an employee whereas other agents are apparently considered self-employed. Provide an organization chart showing the number of staff, the job titles, and which workers are considered employees. Show who has been performing the duties of this labor certification position until now, and show if the person or persons performing the job until now are paid as employees.
>
> If the employer cannot document that the position has been held by an employee up until now, show how the employer's determination that the position is for an employee is in accordance with the Internal Revenue Service guidelines for determining if a worker is to be considered an employee versus self-employed (independent contractor).

(AF 52-53).

In pertinent part, the Employer's rebuttal included: an explanatory letter, dated April 25, 2001, co-signed by Lacrimal Pacana Gonzalez, as Employer/Manager, and Abraham Y. Llanto, as Alien/Beneficiary (AF 36-38); the "Fictitious Business Name Statement" filed on behalf of City Tours & Travel and related documents (AF 44-47); and an Organizational Chart (AF 48).

In the explanatory letter, the Employer/Alien sought to address the foregoing issue as follows:

> The Certification Officer seems to have doubts in regard to the existence of the job to which U.S. workers can be referred. A question arose as to whether the beneficiary is an owner or is related to an owner, whether the position is truly a position for an employee and thus whether the job is truly open to any qualified worker.
>
> At the outset, we wish to emphasize for the record that no relationship of any kind or extent ever exists (sic) between the Employer and the Alien.
>
> The petitioning Employer, City Tours and Travel, is a travel and tours agency registered under the laws of the State of California as a Sole Proprietorship. The records would prove that this business was long registered as a Sole Proprietorship

under the name of the now deceased Virgilio Teves Pacana. With his untimely demise in 1997, the administration of his estate was thereafter turned over to his sister - the herein signatory - who has since assumed the management and administration of City Tours & Travel. Just the same, this Employer's business remained and continues to be a sole proprietorship.

At the expense of being repetitive about it, let it be pointed out that the Beneficiary has never had any pecuniary interest in and neither is he connected with or related to the business of the petitioning Employer in whatever capacity, except that of an Employer-Employee relationship that will yet be recognized between them should this application be approved.

For your ready reference and guidance, we are respectfully submitting the attached pertinent documents to prove the foregoing assertions, along with other supporting papers as required in the Notice...

(AF 37-38).

In the Final Determination, the CO stated, in pertinent part:

Questionable Job Opening 20 CAR (sic) 656.20(c)(8):

...[T]he Notice of Findings questioned whether the job is truly open to any qualified U.S. worker. The employer replies that the company is a sole proprietorship. The rebuttal indicates that the signatory is the sister of the deceased sole proprietor, who is administering the proprietors estate. The exhibits include a fictitious business name statement showing that Lacrimal Pacana Gonzales is the registrant as administrator of the estate of Virgilio Teves Pacana. The rebuttal indicates that the alien is not related to the owner. However, the Notice of Findings referenced the employer's statements on record that it has independent contractor agents, and the employer was advised that it was not clear how the employer had determined that the position being petitioned for was for an employee where other sales agents are independent contractors. The employer was asked to show how it determined that the labor certification position was for an employee. This was to include an organization chart showing which individuals are considered employees, and historical information about the labor certification position. The employer was advised that it could not be documented that the position was held by an employee up until now, the employer should show how its determination that the position is for an employee is in accordance with Internal Revenue Service Guidelines for determining if a worker is considered an employee versus self-employed (independent contractor). The employer was directed to provide this information because of an appearance that the labor certification job was being created for the alien.

> The employer's rebuttal provides an organizational chart which shows the labor certification position as one of the vacant positions. No information is provided as to which workers are considered employees versus which workers are considered independent contractors. The rebuttal includes a record of wages plus exempt payments of $131,300 for 2000, but it does not show which positions in the organization were for the wage earning position. There is no information whatsoever as to whether the labor certification position has ever been held by any worker, whether it has been considered an employee position or one of the independent contractor positions, or why.
>
> The employer states in rebuttal: "At the expense of being repetitive about it, let it be pointed out that the Beneficiary has never had any pecuniary interest in and neither is he connected with or related to the business of the petitioning Employer in whatever capacity, except that of an Employer-Employee relationship that will yet be recognized between them should this application be approved."
>
> It remains that the employer is on record for stating that (it) uses independent contractors as its agents. The rebuttal is no (sic) sufficiently informative to show how the employer determined that the labor certification position is qualifying to be considered as an employee where others are independent contractors. Absent sufficient explanation, it follows that we cannot find that there is a job that is truly open to U.S. workers.
>
> Determination:
>
> Based upon the above, the application is denied.

(AF 34-35).

Upon review, we partially agree with the CO's assessment that the Employer's documentation on rebuttal is not adequate, and does not fully address the "Questionable Job Opportunity" issue raised in the NOF. In particular, we find that the Organizational Chart is ambiguous and raises more questions than it answers (AF 48). However, we also find that the Employer's failure to fully address this deficiency was, at least partially due to the CO's questionable classification of the position as "Travel Agent" rather than "Lead Ticket-Sales Agent." In addition, we note that, in the NOF, the CO questioned whether the job opportunity truly exists primarily based on questions regarding the Alien's possible pecuniary interest or other relationship with the Employer. However, in the Final Determination, the CO focused on whether the position in question is for an employee or an independent contractor. Furthermore, the Employer's Organizational Chart contains the following notations:

> Please note that Mr. Rodolfo Sarceno, who is the Senior Reservations Agent, is also performing the duties of the Supervisor, Ticket-Sales (alt. Title: Lead Ticket-

> Sales Agent). Because of the increased business activities and number of Travel Agents, Mr. Sarceno can no longer continue performing the duties of two positions.
>
> A partial list of Travel Agents and Sub-Agents currently doing business with the company is attached. Since City Tours & Travel is one of the leading ticket consolidators for Philippine Airlines, the company requires numerous Supervisor, Ticket Sales workers to coordinate a specific number of Travel Agents and Sib-Agents, to divide the work load equally.

(AF 48).

Accordingly, the Employer asserted on rebuttal that it needs to create the separate and distinct position(s) of Lead Ticket-Sales Agent due to business expansion (AF 48). Since the CO classified the position in question as Travel Agent (not Lead Ticket-Sales Agent), however, the CO never required the Employer to document its business expansion and thereby demonstrate that the job opportunity truly exists.

In summary, we find that the CO relied upon a questionable job classification. However, even though the State Job Service and CO may have mis-classified the position, the Employer's rebuttal was inadequate because it failed to document that there is a bona fide job opportunity truly available to U.S. workers. The Employer's failure to provide such documentation, however, is largely due to the job mis-classification and ambiguity in the NOF. Under such circumstances, we find that the case must be remanded for the issuance of a new NOF consistent with this opinion.

ORDER

It is hereby ORDERED that this case be REMANDED to the Certifying Officer with instructions to proceed in accordance with the decision herein.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.